IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 202 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UNION OF INDIA

Versus

UNITED INDIA FIRE & GENERAL INSURANCE CO LTD

Appearance:

MR RM VIN for Petitioner

MR P V Nanavati for Respondent No. 1 and 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 03/12/1999

C.A.V.JUDGEMENT

This is an appeal by Union of India, being original defendant, against the judgment and decree passed in Regular Civil Appeal No.53 of 1981 by the learned Joint District Judge at Surat confirming the judgment and decree of the learned 4th Civil Judge (SD) at Surat in Regular Civil Suit No.39 of 1978.

2. The present two respondents instituted the aforesaid Civil Suit before the Civil Court at Surat contending that the second respondent had booked a consignment for being carried to Ambika Saree Centre at Calcutta. That the said parcel contained Art-silk sarees 110 in number. It was also contended that the said consignment did not reach the destination and delivery of goods was not effected. The second respondent, therefore, contended that there was negligence or inaction on the part of the appellant and, therefore, the second respondent suffered the said loss and preferred claim of Rs.5,794.50 before the first respondent which is an Insurance Company with which the parcel was insured by the second respondent.

3. It seems that the first respondent accepted the insurance claim of the second respondent and paid the said amount to the second respondent. Therefore, both the respondents have joined hands in instituting the said suit before the Civil Court at Surat. The main contention of the respondent was that there was negligence or inaction on the part of the appellant and, therefore, they were entitled to the value of the goods booked with the appellant-Railways.

4. The said suit was contested by the present appellant before the Civil Court at Surat, by filing written statement at Exh.15. The appellant denied all the allegations made in the plaint and also denied that there was negligence or misconduct on their part. They further contended that the suit consignment contained Nylon and, therefore, it comes under the category of 'Excepted Articles' as per second Schedule and, therefore, the appellant was not liable under Section 77-B of the Indian Railways Act to pay any amount of damages to the respondents. Therefore, the appellant requested that the suit be dismissed with costs.

5. The trial court framed necessary issues and after appreciating evidence, it came to the conclusion that the owner of the consignment had subrogated their rights and remedies in favour of the Insurance Company. The trial court also found that it was proved that due to negligence and misconduct on the part of the Railway Administration, the respondents have suffered loss to the tune of the suit amount. The trial court also found that notice was duly served upon the present appellant. The trial court found that the appellant was not entitled to any legal defence and, therefore, the trial court was pleased to decree the suit with costs and interest.

6. The matter was carried to the District Court at Surat and learned Joint District Judge confirmed the findings recorded by the Civil Court and dismissed the suit by judgment and decree dated 6.1.1982.

7. Feeling aggrieved by the said judgment and decree of the trial court, the appellant has preferred the present appeal before this Court under Section 100 of the Code of Civil Procedure, 1976.

8. It has been contended here that the judgment and decree of both the Courts below are contrary to law and the Lower Courts have erred in not properly appreciating the provisions contained in Section 77-B of the Indian Railways Act. That the two Courts below have not properly appreciated the terms "short delivery" and "non-delivery". That on the whole, the judgment and decree of the Courts below are illegal and deserve to be set aside. It has, therefore, been prayed that the present appeal be allowed and the judgment and decree of the Courts below be set aside and the suit be dismissed with costs.

9. I have heard the arguments advanced by Mr R M Vin and Mr P V Nanavati, learned Advocates for the parties and have perused the papers.

10. In view of the principles laid down by the Supreme Court in the case of

(i) Ramaswamy Kalingaryar vs. Mathayan Padayachi (AIR 1992 Supp.(1) SCC 712)
(ii) Kashibai w/o Lachiram (2) 1995(7) JT (SC) 48 and
(iii) Parsini (dead) through Legal Representatives vs. Atma Ram (AIR 1996 SC 1558)

the High Court cannot, while functioning as a Second Appellate Court under Section 100 of the Code, upset the findings of fact recorded by the Lower Appellate Court by reassessing the evidence, or reassessing the qualitative value of such evidence on record, and thus cannot reverse such findings of fact.

11. The learned Advocate for the appellant very vehemently contended that additional freight has not been paid by the owner of the consignment. Now on this point, the learned Joint District Judge has observed that the fact to be established by the Railways is whether any

additional freght on account of the scheduled quality of the article to be consigned was asked for. Then the learned Joint District Judge has considered the evidence on record and recorded findings that no such extra money was claimed by the Railway Authorities from the respondents and this being the finding of fact recorded by both the Courts below, it cannot be challenged before this Court in view of the provisions contained in Section 100 of the Code of Civil Procedure Code. (for short, 'the Code') It is therefore, a fact that no such additional amount was claimed and hence it was required to be paid by the respondents to the appellant.

12. Moreover, the learned Joint District Judge has also considered that it was a case of 'non-delivery' of goods and not 'short delivery' thereof. The learned Joint District Judge has distinguished the case of 'non-delivery' from that of 'short-delivery'. Learned Advocate for the appellant could not assail the said findings of the Joint District Judge on the point of law.

13. In any case, there appears to be no illegality committed by the learned Joint District Judge or by the learned Civil Judge on this aspect of the case.

14. The learned Joint District Judge has also recorded a finding that since the owner of the goods is not likely to know the exact cause of 'non-delivery', it may be open, in appropriate case, to the Railway Administration to put forward a defence by proving that since the goods were lost or destroyed, they could not be given delivery of and therefore, that Section would apply. Where it is not proved that the articles in question had been lost/destroyed, non-delivery of the articles must be the result of the cause other than loss or destruction and Section 77-B cannot offer any protection to the Railway Administration against the claim for compensation. In fact, the observations have been drawn from the decision in the case of Union of India v. M/s. K Mansukhram & Sons, 20 GLR 333.

15. So on the one hand, it is not proved on record that owner of the goods was required to pay additional amount and he refused to pay the same. It is also not established that the appellant is protected by the provisions of Section 77-B of the Indian Railways Act in view of the facts and circumstances and particularly the fact that it is a case of non-delivery and not a case of short delivery.

16. Therefore, the question of fact has been properly

discussed and dealt with by the Courts below and no law point has emerged which could be successfully argued in this Second Appeal. Now it is very clear that Section 100 of the Code makes it clear that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to it if the High Court is satisfied that the case involves a substantial question of law.

17. Considering the facts and circumstances of the case, I am of the view that no such question of law has been involved in the present case and, therefore, this appeal would not be tenable for want of such a question of law.

18. Under this circumstance, the appeal is without any merit and hence it deserves to be dismissed with costs.

19. This appeal is, therefore, dismissed. The judgment and decree of the two Courts below are confirmed. The appellant shall pay costs of this appeal to the respondents and shall bear its own costs in this appeal.

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